No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1942

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACKSONVILLE PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 707–711) are reported in 4 Wage Hour Reporter 444. The opinion of the Circuit Court of Appeals (R. 742–746) is reported in 128 F. (2d) 395.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 25, 1942 (R. 746). The petition for a writ of certiorari was filed August 24, 1942, and granted October 19, 1942. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent, a wholesale distributor of paper products, receives large quantities of such products in interstate commerce for the purpose of distributing them to its customers. In the normal course of its business, respondent anticipates in its purchasing from suppliers the regularly recurring demands of its established trade. The flow of goods from suppliers in other States through respondent's branch establishments to the customers is large and constant. The question is whether employees of respondent who are engaged in moving goods through respondent's branches and distributing them to customers located in the same State are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

On July 8, 1940, the Administrator filed a complaint (R. 2–10) against Jacksonville Paper Company alleging that that employer had failed to pay certain of its employees who were "engaged in commerce" within the meaning of the Fair Labor

Standards Act the compensation required by Sections 6 and 7 and had otherwise violated the Act.[1] The complaint sought an injunction against further violations (R. 9). In its answer (R. 22–25) respondent alleged that many of its employees were not subject to the Act and that it was complying with the statutory requirements as to those employees who were covered. At a pretrial conference held on April 15, 1941, it was admitted that respondent had not complied with Sections 6, 7, 11 (c), and 15 (a) (1) with respect to any of the employees at seven of its twelve branch establishments (R. 38).

The facts, as shown by the evidence, may be summarized as follows: respondent is engaged in the business of purchasing, selling, and distributing at wholesale paper products and related articles. It is the largest such distributor in the area served, which includes the States of Florida, Georgia, Alabama, Mississippi, North Carolina, South Carolina, and the Island of Nassau (R. 689–705). During 1940 respondent's gross sales totaled $3,206,041 (R. 698–699).[2] A large variety of paper

[1] The complaint also named as defendants and alleged violations by certain copartners doing business as Southern Industries Company (R. 2). The injunction (R. 712–715) issued by the District Court against these defendants was reversed in part by the Circuit Court of Appeals on a ground (R. 745) which is not challenged here. No question concerning Southern Industries Company is raised in this petition.

[2] The sales of respondent's Florida branches during 1940 comprised about 46 percent of the total business done by

products, ranging from huge rolls of newsprint to paper cups and napkins, is handled (R. 345, 356–357, 359, 365, 424–425, 429, 436, 592–593).

Respondent is dependent upon the channels of interstate commerce for by far the major portion of the products which it distributes; some 500 mills and other suppliers in various parts of the United States, Canada, and Finland ship their products to respondent (R. 195, 237, 350, 352, 399, 407, 420, 425, 426–427, 433, 435, 595–602, 633, 688–689). The shipments are made from the mills to respondent's twelve branch establishments (R. 240–241, 253, 302–303, 373, 395, 425, 464, 466). The goods move in a constant flow by railroad, steamer, and truck (R. 376, 448–452, 468; see R. 309–311, 338–339). Some of the merchandise is shipped direct from the mills to respondent's customers (R. 376, 382–383, 442–443, 474, 568–569, 633–634, 647, 648–649, 667–668) and some of it, while consigned to the branches, is taken from the steamship pier or freight terminal to the customer's place of business, pausing at the branch establishment only for "checking" of the merchandise (R. 376–377, 379, 453–454, 458–459, 460–461, 614, 671, 680–681). Most frequently, however, the merchandise passes through the branch warehouses before delivery to the customer. Rapidity of turn-over and movement are emphasized (R.

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wholesale paper distributors in that State, the remaining 54 percent being divided among 34 other dealers (R. 515–516; see R. 571–572).

375, 424–425, 438–439, 458, 514, 614, 639–640; see R. 300); the goods are "moved through" the branch establishment in the manner usual with wholesale distributors (R. 273–274).[3] Respondent does not store goods for hire (R. 274).

Five of the branch establishments deliver goods to customers in other States; it is conceded that the Act applies to delivery employees at those establishments (R. 37, 42, 49). The controversy arises with respect to such employees at the seven establishments which, while constantly receiving and distributing to their customers large quantities of extrastate merchandise, do not ship any of it across State lines (R. 38, 43).[4]

Considerable quantities of the merchandise handled at the latter establishments are clearly earmarked for particular customers at the time they are ordered from the extrastate suppliers. A large variety of items is printed at the mill with the name of the customer of respondent who is to use them.[5] Shipments of such printed materials are received regularly and frequently at the branch

[3] The stock turn-over of certain of respondent's principal lines was characterized by one witness as "constant" (R. 424, 425); it was testified that orders issued for "most every item in stock, except slow-moving items", and that such items "turn over" in from four to eight weeks (R. 639).

[4] It was agreed at the trial that operations of the Tampa warehouse could be taken as typical of the "disputed" branches (R. 336–337, 531, 534).

[5] Salesbooks (R. 432), laundry bags (R. 434), glassine or cellophane bags (*ibid.*), coffee bags (R. 435), wrapping paper and cellulose tape (R. 650), ice cream and cottage cheese con-

establishments (R. 300–302, 374, 432–434). The wide range of unprinted articles handled precludes respondent from carrying all of them in stock; respondent's price catalogue lists many items which are "stocked at the mill." As a frequent and regular part of its business (R. 404, 418, 431–432), respondent accepts orders for these articles which are filled by obtaining them from the extrastate supplier (R. 252, 404, 414, 481–483).

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tainers (R. 436, 650), hat, shoe, and clothing boxes (R. 650), and envelopes (R. 405, 650) are in this category.

In its Additional Statement of Facts (p. 2 of brief in opposition to petition for certiorari) respondent pointedly minimizes the ratio of direct shipments to customers and special orders to the entire amount of its business, on the theory, presumably, that petitioner's case rests exclusively on such direct shipments and special orders. But although it may be conceded that the direct shipments did not constitute a large proportion of the total volume of respondent's business, it should be observed that the special orders were numerous. One witness stated that there were "quite a few of them. I wouldn't say thousands" (R. 431).

Furthermore, respondent's view of what constitutes a "special order" is influenced by its peculiar conception of a stock item as anything which may be placed, for however short a period, on the shelves of its warehouses, even though the goods may have been ordered for a specific customer exclusively and were to have been delivered to it by respondent, in installments. (See discussion, *infra*, pp. 25–27.) In any event, petitioner's case does not rest primarily upon direct shipments and special orders but on the entire course of respondent's business, which depends largely upon the accurate anticipation of the requirements of a steady market and known customers, whether or not orders were received from such customers prior to the time when the goods were requisitioned from the out-of-State mills.

Some of respondent's so-called "stock items" are as clearly earmarked for particular customers. The Tampa Record Press is the only taker of a certain size of newsprint, a carload of which moved to the Tampa branch about every two months (R. 469, 470, 612–614, 621, 655, 672). Each week respondent delivered 4,000 pounds of book paper, *inter alia*,[6] to the Florida Growers Press; no other customer used this paper and respondent ordered it for the specific purpose of filling orders of the Florida Growers Press as they were received (R. 359–364, 473, 617–618, 622, 674). At the time of the hearing, the Tampa branch was preparing to begin periodic deliveries totaling 3 million ice cream cups to the Poinsetta Dairy; the cups were to be manufactured in Connecticut (R. 388–389, 391, 393–394, 644–645). The record contains other examples of purchases by respondent to meet the unique requirements of particular customers.[7]

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[6] During the 1939–1940 citrus-fruit season, respondent delivered to Florida Growers Press 10,000 pounds of special label paper, a sufficient quantity to print 1½ million labels; during the following season this quantity increased several times (R. 362–364).

[7] The Purity Ice Cream Company used an ice cream cup of a special size; respondent delivered the cups periodically in 5,000 and 10,000 cup lots (R. 644–645). The Peninsular Telephone Company was the only customer for "Atlantic Bond" paper in 250-pound rolls; respondent made deliveries every two weeks (R. 615–616, 622, 652, 673). The Poinsetta Dairy took 250,000 cottage cheese containers manufactured in New Jersey (R. 387–388, 395). All of these

The customers of each branch establishment constitute a stable group; their orders on each regular visit of respondent's salesmen are recurrent as to kind and amount of merchandise (R. 370–371, 373–374, 381, 395–396, 410–411, 438). Before placing his orders, the branch manager has "a pretty good idea" where and when the merchandise will be sold (R. 373, 384, 396, 411, 438); he can estimate with precision, on the basis of past experience, the immediate needs of his trade (R. 438–439, 456, 612, 613).

Almost daily orders are received by respondent for "stock items" whose supply is exhausted (R. 610–611). Respondent orders the merchandise from outside the state and passes it on to the customer immediately upon receipt (R. 439–440, 458, 465, 481–482, 640, 670–671). The employee unloading the freight car has in his possession the orders to be filled from the incoming merchandise (R. 453).

The District Court held that none of respondent's employees at the seven branch establishments in dispute were subject to the Act (R. 707–711). The Circuit Court of Appeals reversed and remanded the cause to the District Court for the entry of "a new decree in accordance with the opinion of this Court" (R. 746). In its opinion the Circuit Court of Appeals held, as to the seven establishments:

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examples are from the operations of the Tampa branch, which was taken as typical of the disputed branches (*supra*, note 3, p. 5).

(a) that the employees engaged in the procurement and receipt of goods from other states are "engaged in commerce" within the meaning of the Act (R. 744); (b) that, with the single exception of the delivery of goods in fulfillment of "prior orders" taken before respondent purchased the goods in another State, the distribution of goods from the branches is not interstate commerce and the employees engaged in such distribution are not within the scope of the Act (*ibid.*).

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In failing to hold that respondent's employees who moved out-of-State goods through its branches and distributed them to its customers within the State under circumstances indicating that it was the normal course of respondent's business to anticipate the regularly recurring needs of its established clientele were "engaged in commerce."

2. In holding that respondent's employees engaged in moving out-of-State goods through its branches and distributing them to customers within the State were not "engaged in commerce", except when moving or distributing "particular goods" ordered by respondent from out-of-State sources to fill specific orders for such goods previously placed with respondent by its customers.

SUMMARY OF ARGUMENT

A. The typical wholesaler, such as respondent, purchases from extrastate sources with the inten-

tion of disposing of the merchandise to his customers as speedily as possible. When he does his interstate purchasing, he knows definitely to whom some of the goods purchased are to be delivered and can anticipate with a large degree of accuracy the demands of his customers generally, irrespective of whether he has received advance orders for the goods before he buys from the manufacturer. With respect to such goods, we think the wholesaler occupies an intermediate position in the stream of commerce, and that it cannot be said that the goods so purchased have reached their intended destination until they are delivered by the wholesaler to his customers.

It is clear that, if the same distributive functions are performed by a manufacturer's agent, or if the wholesaler has received a prior order for the merchandise, the entire movement is interstate. The absence of such formal factors cannot be controlling. There should not be one rule for the wholesaler who waits for a definite order from the customer before purchasing from the manufacturer, and another for the wholesaler who knows from experience what his customers want and does not require them to place formal orders in advance. The wholesaler thus acts as a middleman for the parties at the ends of the interstate flow, and the interstate movement does not terminate until he has delivered the goods.

B. Although no case is directly in point, the decisions support the principles upon which we

rely. This appears most clearly from *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52, *Binderup* v. *Pathe Exchange*, 263 U. S. 291, and *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; the last of these cases is definitely inconsistent with respondent's contentions, rather than the contrary. Cases arising under state statutes involve different considerations, as do cases determining what constitutes interstate rail transportation for purposes of the Interstate Commerce Act. Cf. *Pennsylvania R. R. Co.* v. *Public Utilities Commission*, 298 U. S. 170.

C. Application of the Act to respondent is supported by its purposes and legislative history. To construe the Act otherwise would place at a competitive disadvantage wholesalers clearly subject to it and small wholesalers unable to segregate their intrastate activities. The exemption for retailers and the failure to adopt proposed amendments to the Act also support the construction we have suggested.

ARGUMENT

EMPLOYEES ENGAGED IN MOVING GOODS THROUGH RESPONDENT'S BRANCHES AND IN DISTRIBUTING THE GOODS TO CUSTOMERS IN THE SAME STATE ARE "ENGAGED IN COMMERCE" WITHIN THE MEANING OF SECTIONS 6 AND 7 OF THE ACT

The Fair Labor Standards Act applies to employees engaged in interstate commerce or in the production of goods for such commerce. Sections

6, 7. Respondent's employees are not engaged in production. The question here, accordingly, is whether respondent's employees are engaged in interstate commerce.[6]

The Government's position is that the workers who are engaged at the seven branch establishments of respondent which do not ship across state lines, in moving paper products through the branches and in distributing them to customers, are within the coverage of the Fair Labor Standards Act. The bulk of the goods, we submit, remains in interstate commerce until it arrives at its intended destination, the industrial plant or the establishment of respondent's customer, and its handling and distribution by the employees here involved is an integral part of the interstate journey.

The argument divides into three parts: (A) the nature of respondent's enterprise makes it clear that the branches occupy intermediate, rather than terminal, positions in the flow of interstate commerce; (B) a contrary view gives to the statutory language a reading which is unduly narrow in the light of prior decisions of this Court; and (C) such a view would be disruptive of the Act's purposes.

[6] It has been suggested that "commerce" as used in the Fair Labor Standards Act should be given a narrower meaning than is permissible under the Constitution. But the Act defines "commerce," in the language of the constitutional provision, as "commerce * * * among the several States."

A. RESPONDENT'S BRANCHES OCCUPY INTERMEDIATE POSITIONS IN THE FLOW OF INTERSTATE COMMERCE

The huge wholesaling industry[9] serves, in our economy, as the medium through which large-scale sources of supply meet a nation-wide demand. The wholesaler's economic function is to make available to his trade the products of widely scattered factories, mines, farms, and forests; he draws from all parts of the nation large quantities of goods for the sole purpose of distributing them to his customers, largely industrial and commercial in character.[10]

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[9] During 1939, 200,573 wholesaling establishments distributed goods valued at $55,265,640,000.00 in the United States. U. S. Department of Commerce, *Census of Business; Wholesale Trade, Sales by Classes of Customers* (1939), p. 4. Of the goods handled, some $16,840,241,000.00 worth was delivered to industrial users and $22,834,849,000.00 worth was distributed to retail establishments. *Ibid.*, p. 2.

[10] "The independent middleman is * * * a very important agency in the elaborate and complicated system that makes it possible for producers to sell their goods to distant and unknown buyers and for buyers to get what they want where and when they want it. To adjust far-flung supply to far-flung demand and to insure that goods made today will find a market months hence is a costly service." Twentieth Century Fund, *Does Distribution Cost Too Much?* (1939), p. 100. "The wholesaling structure or mechanism may be defined as that complex of business establishments, which, like the cilia in certain parts of the human organism, are constantly functioning to move the products of industry through the channels of trade from primary producers to the retail outlets or to industrial consumers." Beckman and Engle, *Wholesaling, Principles and Practice* (1937), p. 103. "* * * it is, no doubt, a great convenience for the retailer to have the burden of assembling fall on

The wholesaler himself usually negatives any static concept of his business and has come "to think of the warehouse building as a machine for the movement of goods rather than as a space for storing merchandise."[11] He does not buy for the purpose of building local stocks to satisfy demands as they arise, but scientifically adjusts his orders upon suppliers to the anticipated needs of his usually stable clientele; since the orders he receives are characteristically recurrent as to kinds and

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the wholesaler. If the wholesaler were not here today he would have to be invented, if for no other reason than for the performance of this function alone." *Ibid.*, p. 148. "In the course of time certain channels have been carved out for the flow of goods to their destination." U. S. Department of Commerce, *Census of Business; Wholesale Distribution, Summary for the United States* (1933), Vol. I, p. 3.

[11] U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, Economic Series No. 14: *Effective Grocery Wholesaling* (1941), p. 9; see *ibid.*, p. 15. "Wholesalers are beginning to think of themselves as those who do a definite job—that of giving efficient service in getting goods to the retailers. That is the place to put the emphasis of the business. Possibly, if wholesalers will cease to think of themselves as owners of merchandise and warehouses and concentrate more on the idea that their function is to expedite the movements of that merchandise, efficiently and economically, fewer mortalities might result." U. S. Chamber of Commerce, National Wholesale Conference, *Report of Committee 1: Wholesalers' Functions and Services* (1929), p. 9. The introduction of mechanical aids to the primary aim of moving stock rapidly, such as systematized assembly lines, conveyor belts, counting devices, automatic chutes, mechanical lifting and carrying devices, etc., increases the aptness of the analogy of the distribution warehouse to a machine. *Effective Grocery Wholesaling*, *supra*, pp. 96-111.

amounts of merchandise, the wholesaler's anticipatory ordering attains a considerable degree of precision.[12] Typically, respondent's branch managers have a firm and well-grounded expectation, at the time they place their orders, when and to whom the requested merchandise will be sent from the branch (*supra*, pp. 5–8).

The precision with which orders from customers can be anticipated is one of the factors that makes possible the rapid flow of goods through the wholesale establishment to their destinations, which is essential to the success of the enterprise (see *supra*, pp. 4–5). Profits are, to a large extent, dependent upon speed of turn-over.[13] The effort is

[12] "Purchases are placed on a sound statistical foundation so that overbuying is largely eliminated; losses from sales due to *outs* tend to be minimized; substitutions in filling orders are reduced; reorders from customers are anticipated; delays in filling orders because of shortages in stock as well as back-ordering are reduced; the rate of stock turnover is increased * * *." Beckman and Engle, *op. cit., supra*, p. 343.

[13] Slow turn-over leads to increased overhead costs per unit, "occupancy expense," increased interest on investment, taxes, and insurance on inventory, and losses due to deterioration. "Overstocking" is a frequent cause of failures. Beckman and Engle, *op. cit. supra*, p. 357; U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, Distribution Cost Studies, No. 14, *Wholesale Grocery Operations* (1932), Part IV, p. 37. "The whole tempo of merchandising today calls for frequent buying, quick delivery, and fast turn-over." Wholesale Dry Goods Institute, Report of Ninth Annual Convention, *Modernizing the Wholesale Operation*, January 15, 1936. Rate of profit and rate of turn-over tend to rise and fall together. Graduate School

to engage in "hand to mouth buying," with a directly appreciating effect upon the speed of distribution.[14]

If the business of large-scale wholesale distributors is in fact based upon rapidity of movement through their establishments to the customer, maintenance of the smallest unallocated stocks feasible, and accurate adjustment of orders to anticipated demands, it does not accord with reality to view them as local merchants who bring goods from other states and hold resultant stocks for local sale. They render a procurement service whose essence is the movement of goods from the factory or other extrastate supplier to their customers, and thus act as middlemen in the interstate flow. That movement should not arbitrarily be broken in two and its interstate part be said to end at the wholesaler's establishment; by all functional standards, there is but one journey from the mill whose product the customer desires to the customer's place of business.

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of Business Administration, Harvard University, *Distribution Costs, An International Digest* (1941), pp. 586, 592, 593, 266, 483.

[14] "During the past decade and a half there has been a tendency on the part of wholesalers to purchase frequently and in small quantities. * * * Wholesalers have been motivated to follow a policy of so-called "hand-to-mouth" buying by their desire to increase stock turnover, to avoid speculative losses on market declines, to insure against carrying leftovers from season to season, and to take advantage of changes in style and of special lots toward the end of the season which may be bought at attractive prices." Beckman and Engle, *op. cit. supra*, pp. 336–337.

From an economic point of view, it would not ordinarily be denied that goods flow in a continuous current from the manufacturer, through the wholesaler or other middleman, to the retailer or purchaser. The constitutional standard as to the extent of a continuous interstate flow does not differ from the practical one. Cf. *Swift & Co.* v. *United States,* 196 U. S. 375, 396. If the goods move from a point in one state to an ultimate destination in another, the entire journey, including its local segments, is interstate commerce. *The Daniel Ball,* 10 Wall. 557. Thus, the circumstance that the wholesaler and his customer are located in the same state would not affect the nature of the flow, if it was understood by the importer that the place of business of the customer was to be the ultimate destination of the goods.

The intermediate position of the wholesaler in the interstate flow of commerce is emphasized by the extent to which his functions can be absorbed by the manufacturer with whom he deals. Manufacturers frequently do their own distributing, selling directly to retailers and other customers through branch offices or agents.[15] Such a method of distribution commonly involves a journey from

[15] Beckman and Engle, *op. cit. supra*, pp. 243–245; Twentieth Century Fund, *op. cit. supra*, pp. 106, 198–199; U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, Domestic Commerce Series, No. 19, *Commercial Survey of the Southeast* (1927), p. 168; U. S. Bureau of the Census, *Sixteenth Census of the United States, Distribution of Manufacturers' Sales* (1939), *passim.*

the factory to the manufacturer's branch office or agent, and then a reshipment to the retailer. The temporary stoppage of the movement before it reaches its final destination does not affect the interstate nature of the entire transaction. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 303; *DeLoach* v. *Crowley's, Inc.*, 128 F. (2d) 378, 379 (C. C. A. 5). Thus, where the wholesaling function is absorbed by the manufacturer, the employees engaged in delivery of the merchandise to customers within the state would clearly be "engaged in commerce" within the meaning of the Fair Labor Standards Act. Since the coverage of the Act turns upon the duties of the individual employee (*Kirschbaum* v. *Walling*, No. 910, last Term, decided June 1, 1942), the fact that the workers here involved are employed by an independent wholesaler rather than in the wholesaling organization of a manufacturer should not exclude them from the benefits of the Act.[18]

The court below held that there was but one type of transaction in which the interstate journey of the goods brought from other states by respondent continued beyond respondent's branch to the establishment of the customer. That single type is where

[18] Respondent acts as exclusive distributing agent, within its territories, for various extra-state manufacturers of particular products (R. 347–356, 399, 402, 428–430). In these areas respondent's competitors must buy the product from respondent (R. 351–352), and orders obtained by other representatives of the manufacturer are sent to respondent (R. 416–418, 442).

respondent "takes an order from a customer for goods and purchases them in another State to fill that order, and they are shipped interstate with the definite intention that those goods be carried at once to that customer and they are so carried * * *" (R. 744). The court did not explain why the existence of a "prior order" would change the nature of the wholesaler's service and make "the whole movement * * * interstate" (*ibid*). Plainly, the operative circumstance could not be clarity of allocation of particular goods or quantities of goods to particular customers, for there are types of regularly recurring transactions in this case in which an additional piece of paper could add nothing to an allocation that was already apparent. For example, there are transactions in which the demand for a certain item is unique to a single taker (*supra*, pp. 5–7), and there are those in which the tremendous quantities needed to satisfy a particular demand made it readily apparent for whom the goods were being ordered by respondent (*supra*, p. 7). In such circumstances the goods are obviously not "commingled with the mass of property within the State * * * held solely for local disposition and use." *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 542.

In any event, the doctrine of "appropriation" of particular goods to a particular customer is native to the law of sales and seems peculiarly unsuitable as a limitation upon the scope of an exercise of the federal commerce power. Cf. *Rearick* v. *Pennsyl-*

vania, 203 U. S. 507, 512. In another connection, this Court has stated that an attempted distinction between prior orders and anticipated demand was "without the support of reason or authority." *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 53–54.

A "prior order" bears upon the nature of the importing transaction only in that it conclusively demonstrates "the point where the parties originally intended that the movement should finally end." *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309. But, as the record here discloses, there are other situations in which, although shipment from the manufacturer may precede the order, it is clear from the commencement of the movement not only that the goods are destined for a point beyond respondent's branch, but also exactly to whom they are to go. This is apparent as to the articles manufactured with the consumer's name or label, or as to which respondent has only a single customer. See pp. 5–7, *supra*. And even apart from transactions of this type, which are large and recurring, the destinations of the bulk of the goods ordered by respondent are at all times known to it. This does not mean that respondent knows that a particular case of napkins in a shipment, for example, will go to a certain customer (R. 384–385), but respondent does know that, except in unusual circumstances, a particular group of customers will receive the entire shipment, each purchaser obtaining the portion intended for him. Cf. *Federal Trade Commission*

v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 60.

Respondent is able to anticipate the needs of its customers, and to order to fill them, with a precision that obviates the need of awaiting specific orders. The precision of anticipation which is permitted by a stable clientele and by demands that are regularly recurrent in time and amounts (*supra*, p. 8) thus allow respondent's orders to precede those of its customers in point of time. But the precedence is solely chronological; in every material respect, respondent's orders are occasioned by those of its customers, are placed in response to such orders, and are designed to fill them promptly. The causal relation remains despite the inversion in time. Such inversion "does not affect the character of the business. It is a mere matter of detail in the manner of conducting it." *Grand Union Tea Co.* v. *Evans*, 216 Fed. 791, 795 (D. Ore. 1914). There should not be one rule for the wholesaler who waits for a definite order from the customer before purchasing from the manufacturer, and another for the wholesaler who knows from experience what his customers want and does not require them to place formal orders in advance.

We submit that respondent, acting as middleman for the parties at each end of the interstate movement, operates, in essence, an interstate procurement service. If we are correct in this contention, the application of the Act to the terminal leg

of the transportation which the service entails cannot turn upon the presence or absence of documents which confirm the obvious: that goods are ordered by respondent for customers, and will be sent to them when the needs which occasioned those orders mature into demands and when the goods are received by respondent.

Neither respondent nor the court below urges any persuasive reason why in transactions other than those characterized by "prior orders," respondent's branches should be viewed as dams which separate an interstate flow of commerce from an intrastate continuation. Respondent advances, and the Circuit Court of Appeals seems largely to have accepted, two basic concepts: first, that the goods "come to rest" at the branches, and secondly, that the sales to customers, except where there was an advance order, were purely "local sales" from stocks accumulated for the purpose of making such sales. Neither concept can be supported on the facts developed in this record.

The "come to rest" test seems to have been applied without regard for whether the goods "rested" in either a physical or economic sense. It was held applicable whether the "rest" was momentary or prolonged, and whether it had a function in the importing and distributive process, or was interposed solely for the purpose of furnishing a basis for use of the theory in litigation. This appears most clearly with respect to goods shipped by respondent to customers immediately

upon their arrival. As to such goods, respondent's pre-litigation practice was to send trucks three times weekly to get the goods from the interstate carrier, to bring the trucks into the yard of the branch establishment for checking of the load, and to dispatch the trucks immediately to the customer's place of business without unloading (R. 376–378, 453, 458–459, 671). The only possible "rest" in that situation consisted of the goods' repose for a brief interval in the respondent's yard on the same vehicle which had just carried them in interstate commerce. Beset by litigation (R. 462), respondent evolved a more plausible "rest"; although the need for and desirability of prompt movement had not diminished, the goods were unloaded, brought into the warehouse—near the front, to facilitate an early exit—checked, brought out again, reloaded, and sent on to the customer (R. 378–379, 453–454, 459–461, 460).

This device plainly did not change the continuous nature of the movement, which was not subjected even to "the interruption necessary to find a purchaser." *Swift & Co.* v. *United States*, 196 U. S. 375, 399. Yet, under the decision below, the pause at the warehouse was sufficient to deprive the remainder of the journey of its interstate status. The checkers who checked the goods on the trucks were concededly "in commerce," but performance of the same duties during the goods' fleeting "rest" on the warehouse floor became an entirely local function.

Respondent's efforts to give content to the "come to rest" concept is significant here quite apart from the emphasis it lends to the possibility of evasion." It is apparent that the mere fact of placement of the shipment on the warehouse floor does not mean that the goods have reached their ultimate destination. They have "come to rest" in that sense only if it is not anticipated, or known, that they will go further within a reasonably short time. If it were expected or intended that the goods are to be retained in the warehouse for a long period, it might be said that the interstate journey had ended. The warehouse might then be performing a storage, rather than merely a wholesaling or middleman, function. But the ordinary wholesaler—and clearly, on this record, respondent—does not act in that capacity. See pp. 5–8, *supra*. On the contrary, there is a constant turn-over, and goods are moved in and out as rapidly as possible. (R. 424–425, 639–640.)

It is, of course, probable that some articles are stored in the warehouse for a considerable time. Such goods cannot be regarded as representative or typical of a wholesaler's activities. Even if such

[11] If respondent's "come to rest" theory is accepted by this Court, a premium will be placed upon an appearance of more or less lengthy repose in stock piles. Overstocking, while contrary to the basic rules and economies of efficient wholesaling (*supra*, note 13, p. 15), would extend the goods' stay at the warehouse and markedly reduce the speed of passage which graphically portrays the flow of commerce through the warehouse to the contemplated destinations.

articles were deemed to have come to rest, respondent's employees would still be subject to the Act so long as some of their work related to goods which are promptly moved to the intended destination. This would be true regardless of the proportion of goods deemed to have completed the interstate journey, so long as some substantial part of the employees' work also involved goods which had not. Cf. *United States* v. *Darby*, 312 U. S. 100; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board* v. *Crowe Coal Co.*, 104 F. (2d) 633 (C. C. A. 8), certiorari denied, 308 U. S. 584.

Respondent views any sale of a "stock item" as a "local sale."[*] "Stock items" consist of any lines of merchandise which are available at the branches for sale to all purchasers. No matter how clearly the customer is identified when respondent places its order with the extrastate supplier, respondent insists that the subsequent movement is "local" so long as the goods are classified as "stock items." Thus, respondent plainly had to place orders so as to make agreed periodic deliveries totalling 3,000,000 ice cream cups to the Poinsetta Dairy (R. 388-389), but since this type of cup was regularly sold to other customers as well, respond-

[*] Respondent excepts from the category "local sales" shipments which never come to the warehouse and, therefore, cannot be "in stock," and special orders for printed paper products or other items which assertedly do not constitute a part of respondent's "usual business" (Brief in Opposition, p. 2; see R. 383, 483; but see R. 431).

ent views the Dairy transaction as a local sale from stock (R. 393–394).[19] And even where the demand for merchandise ordered by respondent was unique to a single taker, respondent insisted that the merchandise was a "stock item," apparently because if another willing purchaser unexpectedly appeared he could have some.

Respondent's "stock item" contention is tied in with its attempts to avoid coverage under the "prior order" doctrine and illustrates the abuses to which applications of that doctrine are subject. Defining "special orders" from customers, which it is concededly necessary to fill by specific orders on the suppliers, as orders for unusual items "not carried in stock" (R. 404, 383, 482–483), respondent vigorously denied any other specific orders for particular customers.[20] Thus, since the item was a "stock item," there was no "specific order" upon the supplier in fulfillment of respondent's contract to supply 3,000,000 ice cream cups to the Poinsetta

[19] The actual "stock" of the cups varied from 50,000 to 250,000 (R. 394, 395–396).

[20] Orders by customers for "stock items" whose stock is exhausted are received frequently (R. 611); if no order on the supplier has already been placed by respondent, it is necessary to do so at once and upon arrival of the merchandise it is at once sent to the customer (R. 439, 640, 670–671). In respondent's view, the order is placed to meet its "usual business requirements" (R. 440), i. e., to replenish stock, and the "prior order" doctrine does not apply.

[21] One of the employees testified to the obvious, that the newsprint was ordered by respondent for the specific purpose of filling orders of the Record Press (R. 613).

Dairy (R. 393–394; see *supra*, p. 7). Similarly, the newsprint sold only to the Tampa Record Press (*supra*, p. 7) was termed a "stock item" (R. 479).[21] The testimony of employees that the orders on suppliers for label paper (*supra*, p. 7) were placed "for the specific purpose of filling the order of the Florida Growers Press" (R. 617)[22] and that the paper was kept "in stock" for the express purpose of supplying that customer (R. 674) is immaterial, in respondent's view; the controlling fact is that such paper is a "stock item" (R. 472; but see R. 473). The extremes to which these tenuous distinctions can be carried in an effort to avoid the existence of a "prior order" is exemplified by the testimony of the manager of respondent's Tampa branch, with reference to the fulfillment of respondent's obligation to supply cottage cheese cups to the Tampa Stock Farms Dairy (R. 388), that although "there is no contract," "there is an understanding."

The record affords no support for portrayal of respondent as a local merchant who brings goods from other states and holds them for "local sale" commingled with the general mass of goods in the State (see R. 744). Aside from the essentially intermediate position occupied by wholesalers gen-

[22] There was also testimony that the "Atlantic Bond" taken only by the Peninsular Telephone Company and delivered every other week by respondent (*supra*, note 7, p. 7) was ordered by respondent for the specific purpose of supplying the Telephone Company (R. 615).

erally, and fully shared by respondent (*supra*, pp. 13–16), it is apparent that the wide variety of items handled by respondent, the broad range of individual preferences and needs which the nature of the wholesale paper products business entails, and the frequently large unique demands necessitate that respondent's orders upon the extrastate suppliers be geared closely to the requirements of particular customers. It orders and receives goods to fill those particular requirements, and for no other purpose. The shipments into the state are demonstrably "for the retailer" or other customer, no less than in *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63–64, *infra*.

Ultimately, respondent's "local sale" concept comes to this: however clear the anticipated and intended destination of the goods may be at the time when respondent places its orders, in the absence of a definite purchaser for the particular goods, the items are subject to sale from stock to satisfy a wholly unanticipated demand. Plainly, new customers do appear, and we do not suggest that sales under such circumstances are in interstate commerce. But the business is not run to satisfy such demands; its operations are founded upon the stable and recurring demands which make up its bulk (*supra*, p. 8). That the items are "stock items" does no more than to create a

possibility of diversion from the contemplated channels of flow. As this Court pointed out in *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 55:

> * * * after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. * * *

B. THE GOVERNMENT'S POSITION THAT RESPONDENT'S EMPLOYEES ARE ENGAGED IN COMMERCE IS SUPPORTED BY THE DECISIONS OF THIS COURT

In the foregoing analysis we have sought to show (1) that, when it is known in advance of shipment that the wholesaler is acting as middleman for an identifiable customer or group of customers, the goods involved do not reach their intended destination until they are delivered by the wholesaler to the purchaser, and (2) that the goods are in interstate commerce until they arrive at that destination. These conclusions, we believe, are supported by the authorities.

We are not contending that any particular case or line of cases is directly in point or conclusive. Each decision stands on its own facts, and must be considered in the light of its statutory or constitu-

tional environment.[23] But we think that the principles referred to are approved in the cases dealing with analogous situations.

Federal Trade Commission v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, arose under a statute which applies only to transactions "in interstate commerce." Cf. *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349. The Trade Commission directed an association of wholesalers to cease from making agreements fixing prices for sales within the state of merchandise supplied from sources outside the state. Two transactions were involved: a contract for sale and delivery by the local wholesaler to the local retailer and a contract between the local wholesaler and the out-of-state manufacturer. There was no privity of agreement between manufacturer and retailer. As in the instant case, on some occasions shipments were made directly by the manufacturer to the retailer; in other cases the wholesaler received the shipment in carload or less than carload lots and undertook the local distribution of the goods to the retailer. The question, as framed by the Court, was "whether the sale by the wholesaler to the retailer in the same State is a part of interstate commerce where, subsequently * * * the paper is shipped from a mill in another State to or for the retailer" (pp. 63–64). Answering the question in the affirmative, this Court said (p. 64):

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[23] Cf. *Kirschbaum* v. *Walling*, No. 910, last Term, decided June 1, 1942.

* * * And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier* v. *Alabama*, 218 U. S. 124, 128. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 55. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the State. If the contract of sale provided for shipment to the purchaser from a mill outside the State, then undoubtedly it would be an essential part of commerce among the States. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 515. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. *Dozier* v. *Alabama, supra*; *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113; *Lemke* v. *Farmers Grain Co., supra*, 55. The election of the seller to have the shipment made from a mill outside the State makes the transaction one in commerce

among the States. And on these facts the sale by jobber to retailer is a part of that commerce.

The *Pacific States* case holds that a sale from a wholesaler to a retailer in the same state is interstate commerce when the goods are shipped from outside the state, and draws no distinction between goods shipped directly to the retailer and goods shipped to the wholesaler for distribution to the retailer. In rejecting the suggestion that an express provision for interstate shipment in the contract of sale was essential, the opinion indicated that the ordinary course of business, not the existence of formal documents recognizing it, was essential. The case differs from the case at bar in that the contracts between wholesaler and retailer preceded the interstate shipment. But it does not appear, insofar as the shipments consigned to the wholesaler are concerned, that the manufacturer or shipper knew that the goods were destined for the particular retailer. For reasons set forth *supra*, pp. 19–22, we do not believe that a shipment made as the result of a prior order is any more interstate than one made to fill a known, anticipated, and continuous demand.

The conclusion that a prior order is unnecessary is confirmed by *Binderup* v. *Pathe Exchange*, 263 U. S. 291. In that case, manufacturers of motion picture films in New York entered into lease agreements with motion picture exhibitors in Nebraska. The films which were the subject of the agreements

were consigned to the manufacturer's agents in Nebraska, who delivered them to the local exhibitors. Part of the film was "already in the State prior to the execution of the contracts between plaintiff and the defendants" (p. 293).[24] The plaintiff claimed a violation of the Sherman Act. The defendant asserted that the transactions were not "commerce" inasmuch as the film, which was already in the hands of the Omaha agents of the manufacturers, was not subjected to interstate movement when it was delivered to the local exhibitors by the distributors. The Court rejected that view, stating (p. 309):

> If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the

[24] The Circuit Court of Appeals in the *Binderup* case had summarized the complaint (which constituted the record upon which the case was decided) in part as follows:

"There is no allegation in the complaint of the case at bar that his orders for films were sent from New York or any other state, and shipped to the Omaha branch for delivery to him. On the contrary, the allegations are that, after receipt of them by the managers of the Omaha branch, plaintiff would lease them from the manager." *Binderup* v. *Pathe Exchange*, 280 Fed. 301, 307 (C. C. A. 8).

> agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character "it continues at least until the load reaches the point where the parties originally intended that the movement should finally end." * * *

In the *Binderup* case there was often no prior order at the time the goods reached the intermediate distributing point in the state of destination. Moreover, since the film was held by the local distributor until delivery to the lessee, it had "come to rest" to the same extent as goods shipped to a wholesaler for delivery to his customers.

It is true that in the *Binderup* case the intermediary was the agent of the shipper. It is difficult to see, however, why a different result should be reached when the distribution is by an agent than when the same functions are performed by another type of middleman.[25] In the one case as in the other, the goods held by the middleman or agent are "merely halted as a convenient step in the process of getting it to its final destination." As was stated in *Greater New York Live Poultry Chamber of Commerce* v. *United States*, 47 F. (2d)

[25] In a case decided the same day as the case at bar, the court below indicated that sales by a distributing agent were interstate in nature. *DeLoach* v. *Crowley's, Inc.*, 128 F. (2d) 378 (C. C. A. 5).

156, 158 (C. C. A. 2), certiorari denied, 283 U. S. 837:

> While the receivers cannot on this record be held to be mere agents of the shippers, * * * their intervention as purchasers does not necessarily cause interstate shipment of the poultry to end on delivery to them. * * *

The fact that the wholesaler, as distinguished from the agent, obtains a separate title to the goods, is obviously of no significance. "The particular point at which the title and custody * * * pass to the purchaser, without arresting its movement to the intended destination, does not affect the essential interstate nature of the business." *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 503–504. In ascertaining whether a transaction is interstate, we are not guided by the technical rules of agency any more than by those of property or sales. Cf. *Rearick* v. *Pennsylvania*, 203 U. S. 507. "The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved." *Illinois Central R. R. Co.* v. *Louisiana R. R. Comm.*, 236 U. S. 157, 163; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, 349.

Respondent in this case, and respondent and the lower courts in *Higgins* v. *Carr Brothers*, No. 97, rely largely on *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. That case not only

fails to support the conclusion that distributors engaged in the wholesale distribution of extrastate goods are outside the scope of the Fair Labor Standards Act, but actually recognizes that activities such as those carried on by respondent are "interstate transactions."

In the *Schechter* case, live poultry was shipped from other states to the Manhattan Terminal in New York City and to terminals in New Jersey serving New York City. The poultry was received by commission men or "receivers" at the terminals, where it was unloaded, inspected, and put into coops. The "receivers" sold some of the poultry at the terminals and the remainder was trucked to the West Washington Market in New York City, where further sales were made by them. A large proportion of these sales was made to purchasers (such as the Schechter Corporation) at the West Washington Market after the poultry had been trucked from the terminal where it was first received. The opinion noted that the code provisions involved concerned the operations of the purchasers from the commission men and did "not concern the transportation * * * or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees" to their purchasers (p. 542). The Court declared, however, that the interstate commerce continued through the sale by the "receivers" and until delivery to the purchasers' slaughterhouses (pp. 542–543):

> When defendants [purchasers from the receivers] had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. * * *

See to the same effect *Greater New York Live Poultry Chamber of Commerce* v. *United States*, 47 F. (2d) 156 (C. C. A. 2), certiorari denied, 283 U. S. 837; cf. *Local 167* v. *United States*, 291 U. S. 293.

The respondent occupies a position in the stream of commerce similar to that of the commission men—not of the Schechter Corporation. Like the commission men in that case, its branches receive their goods directly from out-of-state sources. As the commission men unload, coop, inspect and assemble poultry at the terminals and at the market place, respondent's employees unload, check and handle goods at the branches. The commission men distribute their poultry to customers who slaughter and then resell; respondent distributes its goods to customers who consume or resell them. The opinion in the *Schechter* case, and also the other poultry cases, indicates that interstate commerce continues until the customer of the distributor receives the goods. The Poultry Code was held

invalid only because it applied to subsequent transactions, which were clearly intrastate.

Respondent's argument from the *Schechter* case seems to be based on the fact that both the Schechter Corporation and respondent may be described as wholesalers. The significant fact, however, is not the label of the business, but its relation to the interstate movement. The receivers in the *Schechter* case were also wholesalers, and respondent's position is the same as theirs, not as that of the Schechters.

Most of the decisions of this Court upon which respondent relies involve the validity of state taxes and regulations. E. g., *General Oil Co.* v. *Crain*, 209 U. S. 211; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *Chicago, Mil. & St. P. Ry. Co.* v. *Iowa*, 233 U. S. 334. The question in such cases is not whether the subject taxed or regulated is in interstate commerce, but whether the state law discriminates against commerce, places it at a disadvantage, unduly burdens it, or regulates a subject national in character or requiring a uniform system of regulation. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *Cooley* v. *Board of Port Wardens*, 12 How. 298.[28] Accordingly, even if the transactions taxed or regulated are in-

[28] For a discussion of this question, see the brief for the United States as *amicus curiae* in *Parker* v. *Brown*, No. 46, Point III.

terstate, a state law may be valid. The language of cases involving state statutes must be read in the light of the issue presented to the court. Cf. *Minnesota* v. *Blasius*, 290 U. S. 1; *Bacon* v. *Illinois*, 227 U. S. 504; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466.

That different considerations guided the Court in such cases is apparent. For example, in the leading case of *General Oil Co.* v. *Crain*, *supra*, the Court upheld a Tennessee tax on oil, some of which was placed in a tank reserved for oil which, before its arrival in Tennessee, had been sold to particular customers in other states; the oil remained in Tennessee only a few days, sufficient to permit its redistribution in smaller containers (209 U. S., at 213). Although the decision sustaining the state tax was undoubtedly correct, it is clear under the authorities dealing with the scope of federal statutes (*supra*, pp. 29–35) that the interstate movement would not be regarded as halted on a similar state of facts.

Respondent also relies on *Atlantic Coast Line R. R. Co.* v. *Standard Oil Company*, 275 U. S. 257. In that case the oil company unloaded oil from ships in Florida ports into its storage tanks and subsequently shipped the oil by rail to its own bulk stations throughout Florida. The tanks ordinarily contained enough oil to supply the company's requirements for from 30 to 90 days. The question was whether the rail transportation in Florida was

to be governed by interstate or intrastate rates. The Court held the transportation to be intrastate. But, as this Court recognized in *Pennsylvania R. R. Co.* v. *Public Utilities Commission*, 298 U. S. 170, the question as to whether inter- or intrastate railroad rates apply does not depend upon whether the rail movement is interstate commerce, but on the scope which Congress intended to give the phrase "transportation by railroad" in the Interstate Commerce Act. The Court, speaking through Mr. Justice Cardozo, declared (pp. 173–174):

> Appellants say that from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, whether their identity at the beginning was known or unknown, and that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any stage of the ensuing transit. *Baltimore & Ohio S. W. R. Co.* v. *Settle*, 260 U. S. 166, 173; *Ohio Railroad Comm'n* v. *Worthington*, 225 U. S. 101, 108; *Federal Trade Comm'n* v. *Pacific States Paper Assn.*, 273 U. S. 52, 64. But there is confusion of thought in such a statement of the problem. Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce

> which Congress has subjected to regulation in respect of rates by a federal commission * * *[27]

In this connection, it is pertinent to note that in *Chicago & N. W. Ry. Co.* v. *Bolle*, 284 U. S. 74, 78, the Court had held that the words "transportation" and "commerce"—

> were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; * * *.

In the *Pennsylvania Railroad* opinion, the *Atlantic Coast Line* case was cited in support of the proposition that intrastate rail transportation could not be tacked onto a separate interstate movement for rate-making purposes. We think the case is to be construed in the light of this subsequent pronouncement, and not as a decision as to the general scope of interstate commerce.

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[27] The same thought was expressed by Judge Sibley in *Atlantic Coast Line Ry. Co.* v. *Railroad Commission of Georgia*, 281 Fed. 321, 324 (N. D. Ga.) as follows:

> While in the business of buying and selling goods, interstate commerce may reach all the way from first purchase to final delivery, interstate transportation for the purposes of determining the rate to be charged may have narrower limits. * * *

C. APPLICATION OF THE ACT TO RESPONDENT IS SUPPORTED BY ITS PURPOSES AND LEGISLATIVE HISTORY

If there should be doubt as to whether the words used in the Fair Labor Standards Act apply in the present situation, it is appropriate to turn to the purposes and legislative history of the Act in order to determine what Congress intended. These indicia of intention are treated at some length in the brief for petitioner in No. 97 (pp. 25–33), and it is necessary only to summarize them here.

A purpose of the Act, as proclaimed in Section 2, and as recognized in *United States* v. *Darby*, 312 U. S. 100, was to prevent competition in substandard labor conditions by persons engaged in interstate trade. A large majority of wholesale trading areas are interstate,[28] and it is clear that wholesalers

[28] See U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, *Atlas of Wholesale Grocery Trading Areas, Market Research Series No. 19* (March 1938), pp. 45–48; same auspices, *Atlas of Wholesale Dry Goods Trading Areas* (1941), pp. 12–13; National Wholesale Druggists' Assn., *Distribution Through Drug Channels in the 84 Wholesale Trading Areas* (1935), pp. 21, 24–105; Beckman and Engle, *op. cit. supra*, pp. 212–215. Five of respondent's branches distribute across state lines and seven do not (*supra*, p. 5). The area served is delimited by economic considerations, not by state boundaries. U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, Distribution Cost Studies, No. 7, *Problems of Wholesale Dry Goods Distribution* (1930), pp. 7–8; Petersen, *Solving Wholesalers' Problems Through Trading Area Research*, in Journal of Marketing, April 1940, vol. IV, No. 4, Part 2, p. 41. "* * * with free trade between the states guaranteed by the Constitution, state boundaries are little more than a

in a particular state, in selling to customers in the same state, are in competition with wholesalers and other middlemen selling to the same customers across state lines. Clearly, the latter group would be prejudiced if their competitors were not required to comply with the same labor standards.[29]

The decision below could, in practical effect, also result in discrimination between large and small wholesalers in the state of destination. The Circuit Court of Appeals held, and it is not challenged here, that employees engaged in purchasing or unloading incoming shipments are subject to the Act.[5] A large wholesaler can divide his labor force into separate groups, segregating those who perform such work, or those who handle orders for extra-state customers, from the remainder of his office

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granite block by the roadside or the place where the road surface changes from asphalt to concrete, or a sign in the middle of the bridge." J. Walter Thompson Co., *Retail Shopping Areas* (1927), p. 31. Transportation facilities and rates constitute the most important single factors in determining the area served. U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, Information Bulletin No. 314, *Planning Salesmen's Territories* (1925), pp. 2, 5–6; same auspices, Domestic Commerce Series, No. 19, *Commercial Survey of the Southeast* (1927), p. 161. The wholesale dry goods trading area of Jacksonville, Florida, includes southeastern Georgia. *Ibid.*, p. 168.

[29] The trial court, refusing to admit evidence on the subject, took judicial notice "that if two concerns in the same line of business, one complying with the Act and the other not complying with the Act, that the one that does comply with the Act is at a disadvantage over the other one who does not" (R. 499).

staff;[30] or he can establish separate "branches" for goods to be sent into another state.[31] The wholesaler with only a few employees would be unable to arrange his business so as partially to avoid the requirements of the Act, and thus would be subject to a distinct disadvantage.[32]

Although these consequences would not warrant an interpretation of the Act contrary to plain language, they may legitimately be considered if the general phrase "in commerce" be regarded as not carrying a clear meaning in its present setting.

Two other circumstances indicate that Congress intended the Act to apply to wholesalers. In Sections 13 (a) (1) and 13 (a) (2) Congress exempted

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[30] Of 92,794 wholesale establishments in the United States, 3,154 reported sales in excess of $1,000,000 for 1939; these large wholesalers employed 211,823 persons, or 67.2 employees per establishment. There were 30,446 establishments which reported sales of between $10,000 and $50,000 for the year; these small establishments employed 76,822 persons, or 2.5 employees per establishment. United States Bureau of the Census, *Census of Business, 1939, Wholesale Trade, Business Size Groups and an Analysis of Operating Expenses* (1940), p. 11.

[31] In general, only the larger enterprises can engage in branch wholesaling and the branches themselves tend to exceed in size the single establishment of the small independent wholesaler. In 1939 wholesalers with but one establishment averaged 7.9 employees, while wholesalers with 6 to 9 branches averaged 21.8 employees per branch, those with 10 to 14 branches 20.4 employees, and those with 50 or more branches 21.9 employees. U. S. Bureau of the Census, *Census of Business, 1939, Wholesale Trade, Ownership Study* (1940), p. 4.

[32] See testimony of J. W. Knight, president of a competing firm (R. 487–502).

employees engaged in a "local retailing capacity" or in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." An express exemption for employees placed at the very end of the distributive process indicates that Congress regarded it as possible that they might be held to be in commerce. The status of wholesalers, who are one step closer to the interstate movement, must have been even clearer.

In his Interpretative Bulletin No. 5, issued in December 1938, the Administrator of the Wage and Hour Division interpreted the Act as applicable to wholesalers in the position of respondent receiving goods from outside the state. Thereafter, both in 1939 [33] and twice in 1940,[34] attempts were made to amend the bill so as to exempt the employees of wholesale houses from the hour provisions of the Act. None of these proposals was adopted. The ordinary presumption as to the correctness of the administrative interpretation of the Act (*Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534) is reinforced by the refusal of Congress to accept amendments designed to overcome the administrative construction (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488; *Federal Trade Commission* v. *Bunte Brothers*,

[33] 84 Cong. Rec. 5474–5475, 6633.
[34] 86 Cong. Rec. 5267, 5457, 5474, 5499.

Inc., 312 U. S. 349, 352; *United States* v. *Delaware and Hudson Co.*, 213 U. S. 366, 414).

CONCLUSION

For these reasons it is respectfully submitted that the judgment of the court below, insofar as it holds respondent's employees to be not covered by the Fair Labor Standards Act, should be reversed.

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APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*);

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * *

SEC. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

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